STOKELING V. UNITED STATES

Supreme Court Rules on Crimes of Violence

By Kathy Brady

I. Warning on Crimes of Violence: *Stokeling v. United States* (Supreme Court, January 15, 2019)

https://www.supremecourt.gov/opinions/18pdf/17-5554_4gdj.pdf

A. Summary

Conviction of a "crime of violence," as defined at 18 USC § 16(a),[1] has two potential immigration penalties. If a sentence of a year or more is imposed, it is an aggravated felony. 8 USC § 1101(a)(43)(F). Regardless of sentence, if the victim and defendant share a protected domestic relationship, the conviction can be a deportable crime of domestic violence. 8 USC § 1227(a)(2)(E)(i).

In *Stokeling v. United States,* the Supreme Court found that Florida robbery is a crime of violence under the ACCA, because the confrontation involved in "overcoming the resistance of the victim" in a robbery is inherently violent, even if the force used is minor. Our colleagues will publish a comprehensive analysis of *Stokeling,* which appears to conflict with prior Supreme Court precedent while asserting that it follows it. See dissent by Justice Sotomayor, joined by Justices Kagan, Ginsburg, and Roberts. The decision was by Justice Thomas.

The purpose of this advisory is to alert California criminal defenders and immigration advocates to this opinion, and to the possibility that ICE will use *Stokeling* to (wrongly) assert that some California offenses should be held crimes of violence, for example California Penal Code §§ 236/237 (felony false imprisonment) or § 243(d) (simple battery that results in injury). The Discussion section, below, contains initial suggestions for defense arguments in removal proceedings. Of course, this is just the beginning of the discussion.

1. Criminal Defenders

Neither Pen C §§ 243(d) nor felony §§ 236/237 should be held a COV, including under *Stokeling.* However, because *Stokeling* may result in litigation and incorrect charges in removal proceedings, and because so many immigrants are unrepresented in these proceedings, we ask defenders to operate conservatively if the defendant needs to avoid a COV. If it is important for the defendant to avoid a COV (for example, if a sentence of a year or more may be imposed, or the victim is protected under state domestic violence laws), defenders can take these steps:

- Try to avoid a plea to § 243(d). See suggestions for alternatives in the *California Quick Reference Chart,* such as Pen C §§ 32, 136.1(b)(1), 236/237, 243(a), (e), 591, 594, 459/460, possession of a weapon, and others.

- When pleading to felony §§ 236/237, false imprisonment "effected by violence, menace, fraud, or deceit," the best practice is to plead to menace or deceit instead of violence. In fact, §§ 236/237 is not "divisible" between violence, menace, etc., so immigration authorities cannot properly consider the defendant's allocution. But again, careful pleading may help to avoid an incorrect charge in removal proceedings.

2. Immigration Advocates

in removal proceedings should aggressively resist any ICE attempts to charge §§ 236/237 or § 243(d) as a crime of violence. Section 236/237 is overbroad and indivisible as a COV, so even if false imprisonment by "violence" were held to be a COV, the minimum conduct required for guilt under the statute as a whole is not. Section 243(d) should not be held a COV under *Stokeling* because it involves an offensive touching that is neither intended nor likely to cause injury, and, critically, it is a battery statute that requires no intent to overcome a victim's resistance. See Part B, below.

Clients who are considering filing affirmative applications that rely on these offenses not being classed as COVs, and who can afford to wait, may want to wait to file until we see more about the reaction to *Stokeling*. Or, they may wish to consider post-conviction relief.

B. Discussion

Stokeling interpreted the definition of a crime of violence (COV) under the elements clause of the ACCA, a federal sentence enhancement statute that is nearly identical to 18 USC § 16(a). The majority found that Florida robbery is a COV under the ACCA definition because it requires sufficient force to "overcome the resistance of the victim" – even though that can involve a low level of force, such as the force required to grab something while the victim briefly holds on. The dissent argued that the majority decision contradicts well-established precedent on the definition of COV, including *Johnson v. U.S.*, 559 U.S. 133 (2010), because it permits a minor, non-injurious touching to be held a COV.

ICE may argue that *Stokeling* broadens the definition of COV. Regarding California offenses:

- ICE might charge that under *Stokeling,* felony false imprisonment, Pen C §§ 236/237, is a COV if it is committed by "violence," on the grounds that this requires an application of force (no matter how minor) that is sufficient to overcome the will of the victim. Advocates should assert that even if that conduct were found to meet the definition of a COV, no conviction of §§ 236/237 can be a COV because the statute is indivisible and the minimum conduct required for guilt is not a COV.

- ICE might charge that *Stokeling* supports finding that Pen C § 243(d), battery with injury, is a COV on the grounds that it is an offensive touching "capable" of causing injury, even through a fluke occurrence. Advocates should assert that this is wrong because § 243(d) lacks the critical element of overcoming the resistance of a victim.

- ICE may charge that *Stokeling* overturns a Ninth Circuit decision finding that Pen C § 211, California robbery, is not a COV. That would not really change the immigration effect of Pen C § 211, however. It is already treated as an aggravated felony if a year is imposed, as theft.[2]

Stokeling should not affect whether Pen C §§ 243(d) or 236/237 are classed as crimes involving moral turpitude ("CIMT"). In this context, minimally a CIMT requires intent to cause harm or injury.

1. "Force Required to Overcome the Victim's Resistance" and California Pen C § 236/237.

Stokeling held that robbery under a Florida law meets the ACCA definition of a crime of violence. Florida robbery is defined as the taking of money or other property from the person or custody of another, when in the course of the taking there is the use of force, violence, assault, or putting in fear. Fla. Stat. § 812.13(1). The majority noted that Florida robbery requires resistance by the victim to be overcome by the physical force of the offender, regardless of how much force. "For example, a defendant who grabs the victim's fingers and peels them back to steal money commits robbery in Florida. But a defendant who merely snatches money from the victim's hand and runs away has not committed robbery." *Stokeling* at * 20-21. The majority stated that the common law definition of robbery similarly includes force used to overcome the resistance of the victim, even if the force is minor. It stated that the ACCA legislative history shows that Congress intended to include this in the definition.

California Penal Code §§ 236/237 prohibits false imprisonment "effected by violence, menace, fraud, or deceit." While "violence" sounds violent, it includes the slightest physical force beyond what is required for restraint, such as pulling someone by the arm for a few steps.[3] ICE might argue that this is a COV because, like robbery, it at least implicitly requires using force to overcome the resistance of a victim.

Without conceding that false imprisonment by violence amounts to a COV, advocates can assert that even if that were true, it is irrelevant, because §§ 236/237 is overbroad and indivisible as a COV under the categorical approach. [4] It is overbroad because it reaches conduct that is not a COV, such as false imprisonment by menace (which includes the threat of arrest[5]), deceit, or fraud. It is not divisible between these categories, because California courts have found that violence, menace, fraud, or deceit are not elements setting out discrete offenses in §§ 236/237, but are means of committing the offense.[6] Because the statute is overbroad and indivisible, immigration authorities must hold that no conviction of §§ 236/237 is a COV for any immigration purpose, regardless of the underlying facts or any information in the individual's record.

2. Force Capable of Causing Injury and Pen C and California Pen C § 243(d).

Mr. Stokeling argued that even if force is used to overcome a robbery victim's resistance, it cannot amount to a crime of violence unless it can be "reasonably expected" to cause pain or injury. The majority rejected this argument and said that force that is "capable" of causing pain or injury is sufficient for a COV. It discussed the dictionary definition of "capable," for example "having traits conducive to or features permitting." The majority concluded that "*Johnson* thus does not require any particular degree of likelihood or probability that the force used will cause physical pain or injury; only potentiality." *Stokeling* at * 17-18. The dissent forcibly argued that this takes *Johnson*'s use of the term "capable" out of context, and likens the majority's definition to "any law professor's eggshell-victim hypothetical."

California courts repeatedly have held that Pen C § 243(d), battery with injury, can be committed by a mere offensive touching that is unlikely to cause injury, and is not intended to cause injury, but that still ends up causing injury.[7] ICE might assert that Pen C § 243(d) is a COV because by definition, the offensive touching turned out to be "capable" of causing injury. Advocates should assert that this is not a correct interpretation of *Stokeling*, because as extreme as it may be, the majority centers its holding in the context of robbery, and distinguishes battery. It holds that *when physical force is used to overcome a robbery victim's resistance, the nature of that confrontation is what makes the use of even minor force inherently violent.* The majority distinguished this from an insulting or offensive touching in a battery situation. It stated:

Stokeling argues that *Johnson* rejected as insufficient the degree of "force" required to commit robbery under Florida law because it is not "substantial force." We disagree. The nominal contact that *Johnson* addressed involved physical force that is different in kind from the violent force necessary to overcome resistance by a victim. The force necessary for misdemeanor battery does not require resistance or even physical aversion on the part of the victim; the "unwanted" nature of the physical contact itself suffices to render it unlawful. See *State* v. *Hearns*, 961 So. 2d 211, 216 (Fla. 2007).

By contrast, the force necessary to overcome a victim's physical resistance is inherently "violent" in the sense contemplated by *Johnson*, and "suggest[s] a degree of power that would not be satisfied by the merest touching." 559 U. S., at 139. This is true because robbery that must overpower a victim's will—even a feeble or weak-willed victim—necessarily involves a physical confrontation and struggle. The altercation need not cause pain or injury or even be prolonged; it is the physical contest between the criminal and the victim that is itself "capable of causing physical pain or injury." *Id.,* at 140. Indeed, *Johnson* itself relied on a definition of "physical force" that specifically encompassed robbery: "'[f]orce consisting in a physical act, *esp. a violent act directed against a robbery victim*.'" *Id.,* at 139 (quoting Black's Law Dictionary 717 (9th ed. 2009); emphasis added). Robbery thus has always been within the "'category of violent, active crimes'" that Congress included in ACCA. 559 U. S., at 140.

End Notes

[1] 18 USC § 16(a) defines a crime of violence as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another."

[2] See *U.S. v. Dixon,* 805 F.3d 1193, 1197 (9th Cir. 2015) (Pen C § 211 is not a COV) and *Matter of Delgado*, 27 I&N Dec. 100 (BIA 2017) (Pen C § 211 is an aggravated felony as theft if a sentence of a year or more is imposed).

[3] See, e.g., *People v. Castro* (2006) 138 Cal. App. 4th 137, 140 (pulling by the arm supports a felony §§ 236/237 conviction).

[4] For more information, see ILRC, *How to Use the Categorical Approach Now* (2017) at www.ilrc.org/crimes.

[5] *People v. Moore* (1961) 196 C.App.2d 91, 99); see also *People v. Majors* (2004) 33 Cal.4th 321 (kidnapping).

[6] See *People v. Henderson* (1977) 19 Cal. 3d 86, 95 (there is "no basis for severing false imprisonment by violence or menace from the offense of felony false imprisonment; the Legislature has not drawn any relevant distinctions between violence, menace, fraud, or deceit."), partially reversed on other grounds by *People v. Flood* (1998) 18 Cal 4th 470.

[77] Section 243(d) includes an offensive touching that was neither intended nor likely to cause the injury. See CALCRIM 925. The Legislature enacted § 243(d) to provide felony punishment for a battery that causes harm "no matter what means or force was used" and to fill a "gap in the law of assault and battery" by providing punishment for an injury caused by other than violent force. *People v. Hopkins* (1978) 78 Cal. App. 3d 316, 320-321. It has been used to prosecute conduct that did not involve violent force or overcoming resistance. See, e.g., *People v. Myers*, (1998) 61 Cal. App. 4th 328 (victim yelled and poked at defendant and defendant pushed victim away defensively; victim slipped on wet pavement and was injured); *People v. Finta*, 2012 Cal. App. Unpub. LEXIS 7488 (Cal. App. 1st Dist. Oct. 17, 2012) (defendant "shoved" a man on his bicycle when he thought that the cyclist had stolen his property; cyclist fell and was injured); *People v. Hayes* (2006) 142 Cal. App. 4th 175 (defendant kicked a large ashtray, which fell over and hurt an officer's leg).

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